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No. 79-1706

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN ALLEN ANDREWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Fourth Amendment requires federal law enforcement officials at the termination point of a controlled delivery to obtain a warrant before re-opening a package of narcotics that previously had been lawfully examined by local police and released solely for the purpose of effecting the controlled delivery.[1]

1. On the afternoon of March 23, 1979, an unidentified man presented a package to the Continental Airlines Cargo Service office at Miami International Airport. The

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[1]The judgment of the court of appeals was entered on March 19, 1980 (Pet. App. 1; 618 F. 2d 646). The petition for a writ of certiorari was filed on April 23, 1980, and is therefore out of time under former Rule 22(2) of the Rules of this Court.

package was addressed to petitioner in Denver, Colorado. According to writing on the outside, the package contained a "dispenser housing" and was being sent by Inter-American Autobar Systems. The cargo service supervisor became suspicious because goods sent by corporations were not usually wrapped in brown paper without the trade name or logo of the company. He therefore decided to open the package and, upon removing the contents (Tr. 39),[2] found that it contained a plastic bag of white powder. The supervisor then notified the local police, who conducted a field test and determined that the substance was cocaine. A DEA agent in Denver was notified about the shipment of cocaine, and a decision was made to effect a controlled delivery. Accordingly, after a small quantity of the white power had been removed, the package was resealed and shipped to Denver on a Continental flight that evening. Upon its arrival, the package was secured by the DEA agent in a vault at the Denver airport (Pet. App. 2-3).

At approximately 11:15 the following morning, petitioner arrived at the airport to claim the package. The DEA agent, dressed in the uniform of a Continental Airlines clerk, told petitioner that the package had been partially open when it arrived and that it did not contain machine parts as stated on the air bill. The agent asked petitioner whether he was aware of the mislabeling. When petitioner reponded that he was, the agent remarked that the package appeared to contain drugs and that the police should be notified, unless petitioner would make it worthwhile for him not to report the matter. Petitioner asked how much the agent wanted. The agent replied that $50 was reasonable, and petitioner wrote the agent a

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[2]"Tr." refers to the transcript of the suppression hearing held on May 11, 1979.

check for that amount. The agent then asked whether the check was good, and petitioner stated that although he might not have sufficient funds in his account at the moment, there would be plenty of money to cover the check in a day or two. The agent took the check and gave the package to petitioner. As petitioner walked to his car, he was arrested by DEA officers. The package of cocaine was taken into custody and re-opened at the DEA office in Denver (Pet. App. 3-4).

2. In an indictment filed on April 12, 1979, in the United States District Court for the District of Colorado, petitioner was charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Prior to trial, petitioner filed a motion to suppress the cocaine on the ground that it had been discovered as the result of an unauthorized search of the package by the Continental Airlines employee in Miami, Florida. Following a hearing, the motion was denied. Petitioner then filed a second motion to suppress, contending that the DEA officers who arrested him upon receipt of the cocaine shipment in Denver had violated the Fourth Amendment by re-opening the package without a warrant. The district court granted this motion to suppress. On the government's appeal pursuant to 18 U.S.C. 3731, the court of appeals reversed (Pet. App. 1-23; 618 F. 2d 646).

3. Review of the instant case by this Court would be premature, since criminal charges are currently pending against petitioner in the district court. The interlocutory ruling of the court of appeals pertains merely to the admissibility of evidence at petitioner's future trial—a trial that has already been substantially delayed—and thus it places petitioner in the same position he would have occupied if the district court had denied the motion to suppress in the first instance. Such a denial would not

have been subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-856 (1978); *Abney* v. *United States*, 431 U.S. 651, 659 (1977); *DiBella* v. *United States*, 369 U.S. 121 (1962); *Cogen* v. *United States*, 278 U.S. 221 (1929). The same considerations that counsel against a defendant's interlocutory appeal of the denial of his suppression motion militate against interlocutory review of the present suppression issue by this Court. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); see also *American Export Lines, Inc.* v. *Alvez*, No. 79-1 (May 12, 1980), slip op. 3; *id.* at 3, 4-5 (Marshall, J., dissenting). In particular, petitioner may be acquitted at trial, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by seeking review of the final judgment. See *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916); cf. *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).[3]

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[3]The problem of premature review is exacerbated in this case by the fact that petitioner challenged the actions of the Continental Airlines clerk and the local police in Miami as well as those of the DEA agents in Denver. The district court denied petitioner's first motion to suppress, finding that the events in Miami did not violate the Fourth Amendment, but it granted petitioner's second motion on the ground that the warrantless re-opening of the package in Denver was unconstitutional. If plenary review is undertaken at this stage, the Court will be forced either to pass upon the validity of the search in Miami, which was sustained by the district court in a pretrial order that petitoner cannot immediately appeal, or to proceed in a piecemeal fashion by adjudicating the legality of the law enforcement activities in Denver without deciding the lawfulness of the antecedent and closely related activities in Miami. The undesirability of either alternative reinforces the inappropriateness of interlocutory review of petitioner's claim.

4. In any event, there is no merit to petitioner's argument that "even should the initial 'search' at the Continental cargo office in Miami be treated as beyond the reach of the Fourth Amendment, still the Denver search and seizure was * * * [invalid]" (Pet. App. 11). The initial discovery of the cocaine was the result of a private search conducted by a Continental Airlines employee based upon his suspicions concerning the shipment. Local police were called to the area and determined that the white powder contained in the open package was cocaine. A controlled delivery was then arranged, and, with the cooperation of the airline, the package was shipped to the DEA agent in Denver, in whose custody the package remained until its delivery to petitioner. At all times after the initial discovery in Miami, the package was subject to close governmental supervision and control. Where, as here, a package has been lawfully examined and seized by law enforcement authorities and is thereafter released solely for the purpose of making a controlled delivery, the subsequent re-opening of the package, the contents of which have remained unchanged, does not implicate any of the values sought to be protected by the Fourth Amendment. Cf. *Walter* v. *United States*, No. 79-67 (June 20, 1980), slip op. 7; *id.* at 2-3 (White, J., concurring); *id.* at 2 (Blackmun, J., dissenting). In these circumstances, the warrant requirement does not apply. See, *e.g.*, *United States* v. *Bulgier*, 618 F. 2d 472 (7th Cir. 1980), petition for cert. pending, No. 79-2069 (filed June 30, 1980); *United States* v. *Ford*, 525 F. 2d 1308 (10th Cir. 1975); *United States* v. *Issod*, 508 F. 2d 990 (7th Cir. 1974), cert. denied, 421 U.S. 916 (1975); *United States* v. *DeBerry*, 487 F. 2d 448 (2d Cir. 1973); *United States* v. *Blanton*, 479 F. 2d 327 (5th Cir. 1973).

Nor, contrary to the dissenting opinion below (Pet. App. 17-23) upon which petitioner relies (Pet. 5), is this

result inconsistent with *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979). While the officers in *Chadwick* and *Sanders* had probable cause to conduct a search, there had been no governmental inspection and confiscation of the container in question prior to the challenged warrantless search. Accordingly, the defendant retained a reasonable expectation of privacy that was protected by the Fourth Amendment. In the instant case, however, the lawful examination and seizure of the package by the local police in Miami, following the initial discovery of narcotics by the Continental Airlines employee, served to dispel any legitimate privacy interest petitioner might have had, and hence the subsequent re-opening of the package in Denver at the conclusion of the controlled delivery was not an independent and distinct search that required a warrant. See *United States* v. *Bulgier*, *supra*, 618 F. 2d at 475-476.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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